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Reversed Hunt D Wade

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 147.

WILLIAM BARNES, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED FEBRUARY 11, 1874.

4 Allen, 98, Mass - 57
17. John 438
11 N.Y. 372

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1-2 In the supreme court of the District of Columbia, the 29th day of January, 1874.

WILLIAM BARNES
vs.
THE DISTRICT OF COLUMBIA. } At law. No. 9239. In error.

Know all men by these presents that we, William Barnes and Amos Hunt, his surety, are bound unto the above-named defendant in the sum of one hundred dollars, to be paid to the said defendant or its successor or successors; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 29th day of January, 1874.

Whereas the above-named William Barnes hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named William Barnes shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

WILLIAM BARNES. [SEAL.]
AMOS HUNT. [SEAL.]

Sealed and delivered in presence of—
L. P. WILLIAMS.

Approved:

D. K. CARTTER,
Chief-Justice.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between William Barnes, plaintiff, against the District of Columbia, defendant, a manifest error hath happened, to the great damage of the said William Barnes, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this 7th day of February, in the year of our Lord 1874, and of the Independence of the United States the 98th.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP, *Asst. Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To the District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein William Barnes is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER, *Chf. Just.*

Service acknowledged this 7th day of February, A. D. 1874.

WILLIAM A. COOK,
For Deft.

4 (Indorsed:) William B. Filed Feb. 7, 1874. R. J. Meigs.

5 The answer of the chief-justice and justices of the supreme court of the District of Columbia, within named.

The record and proceedings whereof mention is within made follow, in these words, to wit:

Declaration.—Filed January 16th, 1872.

In the supreme court of the District of Columbia, the 16th day of January, A. D. 1872.

WILLIAM BARNES, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No.

The plaintiff sues the defendant for money due and payable by the defendant to the plaintiff, for that whereas, on the date hereinafter mentioned, and for a long time prior thereto, there was and
6 still is a certain common and public highway in the city of Washington, in the District of Columbia, called K street south or southeast, which was and is used as such highway by the good citizens of the United States for passing and repassing on and over the same on foot as well as otherwise; and whereas said defendant, well knowing the premises, was bound to keep said highway in such condition as to render it safe and convenient for passage and transit as aforesaid, on, over, and across the same; yet, nevertheless, the plaintiff alleges that heretofore, to wit, on the 14th day of October, A. D. 1871, the said highway was out of repair and in a dangerous and unsafe condition by reason of the gross negligence and default of the defendant, of all of which the said defendant had notice; yet, nevertheless, to wit, on the day and year last aforesaid, at the county aforesaid, in the city and district aforesaid, the said defendant not performing and regarding its
7 duty as aforesaid, wrongfully and negligently permitted and allowed the public highway or street as aforesaid to be and remain out of repair and in a dangerous and unsafe condition, unguarded, and without fixing or placing, or causing to be fixed or placed, any light

or lights, signal or signals, barricades or other warning, at or near the deep, dangerous, and great excavation in said street, between 6th and 7th streets east or southeast, in said city and district, to denote or show that the same was so there as aforesaid, and made no effort to secure the same against accident, or to warn persons passing along said public or common highway or street of the existence of said excavation or deep pit, by means of and in consequence of which gross negligence and failure of defendant to perform its duty in that respect aforesaid

8 the plaintiff then and there, to wit, on the day and year aforesaid, in the night-time, while walking moderately and carefully along and across said street or highway, along the north side thereof, and between the streets aforesaid, slipped and fell into a deep pit, excavation, hole, or trench, which was then and there, and for along time had been, in the street aforesaid, between the streets aforesaid, left open, unguarded, and unprotected in any manner whatsoever, as aforesaid, through the gross negligence and default of the defendant, whereby the bone or bones of the plaintiff's right leg, near the ankle, became and were broken or fractured, sprained, and bruised, and otherwise injured, and whereby the plaintiff's ankle-joint was rendered weak and unsound, and the plaintiff unable to use his leg and ankle-joint without great pain and weakness therein, and so by means of said injury the plaintiff became and was sick, lame, and disordered for a

9 long space of time, during which he suffered and still suffers great pain, and was and is hindered and prevented from attending to his necessary and lawful business, and was and is deprived of divers gains and profits, and was obliged to expend large sums of money, to wit, $1,000, in and about endeavoring to be healed and cured of said fractures, bruises, and injuries, as aforesaid, and is permanently incapacitated and rendered unable to transact and attend to his lawful business, and is also seriously and permanently injured in his bodily health and strength, to the great damage of the plaintiff, in the sum of thirty thousand ($30,000.00) dollars, and therefore he brings his suit.

R. K. ELLIOT,
Plaintiff's Atty.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

R. K. ELLIOT,
Plaintiff's Atty.

10 *Summons issued January 16th*, 1872.

In the supreme court of the District of Columbia, the 16th day of January, 1872.

WILLIAM BARNES, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9239.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness, D. K. Cartter, chief-justice.

[SEAL OF COURT.] R. J. MEIGS, *Clerk.*

ELLIOT.

11 NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

(On back:)

Served copies of the declaration, notice to plead, and this summons on the defendant, H. D. Cooke, governor, the 16th day of Jany., 1872.

A. SHARP,
U. S. Marshal of D. of C.

Plea.—Filed February 2nd, 1872.

In the supreme court of the District of Columbia, this 2d day of February, 1872.

WILLIAM BARNES
v.
THE DISTRICT OF COLUMBIA. } At law. No. 9239.

The defendant says that it is not guilty as alleged.

WILLIAM A. COOK,
Atty. for the Dist. of Col.

To the CLERK.

12 *Joinder of issue.—Filed February 5th, A. D.* 1872.

In the supreme court of the District of Columbia, the 5th day of February, A. D. 1872.

WILLIAM BARNES
v.
THE DISTRICT OF COLUMBIA. } At law. No. 9239.

The plaintiff joins issue upon the defendant's plea.

R. K. ELLIOT,
For Plaintiff.

Note of issue.—Filed February 5th, 1872.

In the supreme court of the District of Columbia, this 5th day of February, A. D. 1872.

WILLIAM BARNES, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9239.

13 R. K. Elliot, plaintiff's attorney.
Wm. A. Cook, defendant's "
Last pleading filed February 5th, 1872.

R. K. ELLIOT,
For Plaintiff.

To the CLERK.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing on the fourth Monday, 27th day of January, A. D. 1873.

MONDAY, *January 27th*, 1873.

By order of Chief-Justice Cartter, presiding, the court is opened by proclamation of the marshal, pursuant to the rule of court.

WEDNESDAY, *March* 19, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

14 WILLIAM BARNES, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9239. Cal. 81.

And now comes here as well the plaintiff, by his attorney, Mr. Elliot, as the defendant, by its attorney, Mr. Cook, and a jury of good and lawful men of this District, to wit: William M. Shuster, Columbus Alexander, Asa L. Hazleton, James R. Harrover, Henry D. Gunnell, John Van Riswick, John W. Boteler, George Neitzey, Henry Coburn, George Becker, Robert A. Griffin, and Robert Toleaferro, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

FRIDAY, *March* 21, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

WILLIAM BARNES, PLFF.,
v.
THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9239. Cal. 81.

15 And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiff, and assess his damages by reason of the premises at the sum of three thousand five hundred dollars, besides costs. Therefore it is considered that the plaintiff recover against the defendant said sum of three thousand five hundred dollars for his damages as aforesaid found, and $63\frac{50}{100}$, costs of suit, and have execution thereof.

Motion for new trial.—Filed March 24, 1873.

In the supreme court of the District of Columbia.

BARNES
v.
DISTRICT OF COLUMBIA. } At law. No. 9239.

16 And now, to wit, March 24th, 1873, comes the defendant and moves the court for a new trial and in arrest of judgment, and files the following reasons:

First. Because the verdict of the jury was against the law.
Second. Because the verdict of the jury was against the evidence.
Third. Because of error in the charge of the court.
Fourth. Because the charge of the court was misunderstood and misconstrued by the jury.
Fifth. Because the damages awarded were excessive.

WILLIAM A. COOK,
Atty. for Defendant.

SATURDAY, *April 19th*, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

16½ WILLIAM BARNES, PLFF., *vs.* THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9239.

Upon argument of the defendant's motion for a new trial, it is considered that the same be, and is hereby, overruled.

Order for fi. fa.—Filed August 2, 1873.

In the supreme court of the District of Columbia.

WILLIAM BARNES *v.* THE DISTRICT OF COLUMBIA. } At law. No. 9239.

Issue "fi. fa." for amount of judgment and costs in this case.
To the CLERK.

ELLIOT,
For Plaintiff.

Fi. fa. issued August 2, 1873.

16¾ In the supreme court of the District of Columbia, the 2d day of August, 1873.

WILLIAM BARNES, PLAINTIFF, *v.* THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9239.

The President of the United States to the marshal for said District, greeting:

You are hereby commanded that of the goods and chattles, lands and tenements of the defendant, you cause to be made $3,500.00 on int. from March 21, 1873, which the plaintiff lately in said court, in said suit, recovered of said defendant for his damages; and the further sum of $63.50 for his costs and charges by him about his suit expended, as appears of record; and return this writ into the clerk's office of said court within 60 days from the date hereof, so indorsed as to show when and how you have executed the same.

Witness D. K. Cartter, chief-justice of said court.

[SEAL OF COURT.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Asst. Clerk.

R. K. ELLIOT.

(On back:) Levied as per schedule, August 20th, 1873.

17 Proceedings before the supreme court of the District of Columbia in general term, at September term, 1873, commencing on Monday, the 22d day of September, 1873. Present: Chief-Justice Cartter, and Justices Olin, Wylie, and Humphreys.

MONDAY, *September* 22, 1873.

By order of the court the session is announced by proclamation of the marshal.

TUESDAY, *September* 23, 1873.

Session resumed pursuant to adjournment. Present: Chief-Justice Cartter, and Justices Olin, Wylie, and Humphreys.

18 WILLIAM BARNES, PLFF., *vs.* THE DISTRICT OF COLUMBIA, DEFT. } At law. No. 9239.

And now comes the defendant, by its attorney, W. A. Cook, and moves the court for a new trial on exceptions, and that this cause be placed upon the calendar of appeal causes to be heard at the present term; whereupon comes the plaintiff, by his attorney, R. K. Elliot, and by leave of the court first had and obtained, presents and files the following reasons why the above-entitled cause should not be placed on the calendar and heard and reviewed by this honorable court in general term: 1. Because there is no motion filed according to law for a new trial, nor no appeal taken according to law and the rules of practice of said court, whereby the said cause can be heard and reviewed in general term. 2. Because the alleged bill of exceptions in said cause do not appear to have been filed and noted upon the min-
19 utes of the court as part of the record of the cause, as required by the rules of practice of the court. 3d. Because the record in said cause is not attached to, and made part of, said bill of exceptions. 4. That the judgment rendered on said cause on the 21st of March, A. D. 1873, has become final and absolute, by operation of law and under the rules of practice of this honorable court; and therefore cannot lawfully be reviewed in the general term thereof. 5. That no supersedeas bond having been filed in said cause, according to law and the rules of practice of said court, execution regularly issued on said judgment on the 2nd day of August, A. D. 1873, and was regularly levied on property of the defendant on the 20th day of the same month and year. Wherefore the plaintiff insists that said cause cannot now be lawfully re-opened and reviewed by this honorable court in general term, and objects thereto.

20 And upon argument of the aforesaid motion of the defendant and the plaintiff's aforesaid objections thereto, and due consideration thereof, it appearing to the court that a bill of exceptions was tendered to the circuit court during the term at which the judgment aforesaid was rendered, to wit, on the 26th of April, 1873, and that the same was signed and sealed by the justice presiding at the trial, but was not made of record in the minutes of the court by clerical omission: Therefore, it is ordered that the said bill of exceptions be, and the same is hereby, made part of the record now for then. And it is further ordered that the cause be placed upon the calendar of causes of this present term, and that said motion for a new trial upon exceptions do stand for argument, and for a review of the judgment and proceedings of the circuit court, just as if the said bill of exceptions had been
21 made of record in the said circuit court.

Bill of exceptions.

FIRST BILL.

In the supreme court of the District of Columbia.

WILLIAM BARNES
v.
THE DISTRICT OF COLUMBIA. } At law. No. 9239.

Upon the trial of this cause the plaintiff, to maintain and prove the issue on his part joined, offered in evidence for the purpose, among other things, of showing by what authority the grade of K street between 6th and 7th street was changed, an ordinance of the late corporation of Washington, entitled "Joint resolution in relation to the Baltimore and Potomac Railroad Company," approved May 30th, 1870, together with the plat referred to in said ordinance, which said ordinance is as
22 follows: Whereas a charter has been granted by the Senate and House of Representatives of the United States to the Baltimore and Potomac Railroad Company to construct a railroad to and within the city of Washington, District of Columbia, by act approved February 5th, 1867; and whereas they did further, by supplemental acts approved March 18th, 1869, and March 25th, 1870, grant to the said Baltimore and Potomac Railroad Company the option of two lines in the city of Washington, one by Virginia avenue, K street, &c., and the other by North Carolina and Virginia avenues, &c., the said Baltimore and Potomac Railroad Company having now selected the Virginia avenue and K street route, do herewith make application to the mayor and board of aldermen and board of common council of the city of Washington for liberty to construct their railroad upon the Virginia avenue
23 and K street route, in conformity with the accompanying plat: Therefore,

Be it resolved by the board of aldermen and board of common council of the city of Washington, That the Baltimore and Potomac Railroad Company be permitted to construct that portion of their road entering into and within the city of Washington, at a point on the northern shore of the eastern branch of the Potomac River, between South L and M streets, as set forth in the accompanying plans and profiles; thence running westwardly between said streets to the intersection of Virginia avenue with South L and East Twelfth; thence along said Virginia avenue, by a tunnel under the surface, northwestwardly to South K street; thence along South K street westwardly to East Third street; thence by a line curving to the right, to either the north or south bank of the canal, northwestwardly to Virginia avenue; thence along Virginia avenue northwestwardly to the intersection
24 of South C and West Ninth streets; and they are also permitted to change the grades of certain streets at certain points, as designated on said profile and plan, so that the grade shall conform to the blue figures on said plan, and shall be so laid down upon the books in the city surveyor's office as the established grades: Provided, however, That any streets or avenues under which the said railroad may pass shall be bridged or otherwise covered by said company at their proper expense; and whenever sewers, gutters, curb-stones, or side-walks, flag foot-ways, gas or water pipes are disturbed or moved by the said company, the same shall be rebuilt in a proper and satisfactory manner, at the expense of the said railroad company, and without cost or loss to any citizen or the

corporation of Washington. To which ordinance and plat the defendant, through its counsel, objected, but the court overruled the ob-
25 jection and permitted said ordinance to be read and said plat to be exhibited to the jury, whereupon the defendant, through its counsel, prayed leave to except, and did except, to the ruling of the court, and prayed the court to sign and seal this its first bill of exception, which is done this 20th day of March, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

Second bill.

Upon the further trial of said cause, and after the evidence on both sides had been closed, the defendant, through its counsel, prayed the court to instruct the jury as follows: The present government of the District of Columbia differs from the late government of the corporation of Washington in this, viz, that under the act of Congress of the 21st of Feb'y, 1871, entitled "An act to provide a government for
26 the District of Columbia," it is not charged with the care and control of the streets and avenues. That act confers this care and control on the board of public works, composed of the appointees of the United States, who are paid by it, and over whom, as respects the regulation and repairs of the streets and avenues, the District government has no commanding or superintending power. If, therefore, a defect created by the old corporation of Washington existed in K street S. E., which was the occasion of the injury of the plaintiff, whether with or without common care and prudence on his part, the District of Columbia would not be responsible for the injury.

But the court refused to grant said instruction or allow the same to be read to the jury, to which ruling of the court the defendant, through its counsel, prayed leave to except, and did except, and prayed the court to sign and seal this its second bill of exceptions, which
27 is done this 20th day of March, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

Third bill.

And upon the conclusion of the case and the rejection of the prayer of the defendant the court instructed the jury as follows:

GENTLEMEN OF THE JURY: Mr. Barnes brings his action against the government of the District of Columbia to recover damages for an injury to his limb in consequence of the culpable carelessness and negligence of the city in the control and management of its streets. There is no serious controversy about the plaintiff's having been injured, about his having met with the accident, an accident serious to his comfort and future capacity—physical capacity. I believe that is an undisputed question here. The issue raised is whether that injury su-
28 pervened his own fault first, or whether it was the product of the negligence of the government of the District of Columbia, or the product of the negligence of the Baltimore and Potomac Railroad Company in such wise as not to involve the responsibility of the District. Now, these three issues become important issues, and the case in every regard is one of more than usual importance. In regard to the principles involved in it and in regard to the consequence of

the injury to the plaintiff: In the first place, was the plaintiff in fault? For this question is made an issue by the defence. Now, all the court can say to you as enlight'ning that issue is, that every citizen is held responsible for the exercise of reasonable discretion and vigilance and diligence in his self-preservation; and for the purpose of having him do it, nature has provided every man with his cau-
29 tions in that regard. The Almighty did not send people into this world without sending with them a monitor to take care of their lives. Self-preservation is an instinct with humanity; but notwithstanding this constitutional guard with which the Creator has furnished us, it is found, in the history of men's lives and of their deaths, that they become careless of the instrumentalities to their preservation. A large portion of them drink themselves to death, and others in the pursuit of the enjoyments of different kinds run into the grave before their days are half out, and others again become habitually careless in clothing and in food, in labor, exertion, and in the exercise of proper diligence in the preservation of their carcasses. If you find in this case that the plaintiff, who is entitled to the occupation of the streets of the city of Washington for the purposes of his business or the purposes
30 of his pleasure, his leisure to traverse them, if you find that in traversing K street, between 6th and 7th, which is the theatre of his misfortune, he neglected the reasonable precautions that an adult in the exercise of good sense should have regarded, why, he cannot complain, and he has no right to bring an action. But you must find that the fault was his from the facts of the case as developed in the proof, before you can find that in this regard he has no cause of action. With these remarks I dismiss that issue.

It is claimed by the plaintiff that he, being exempt from fault in the premises, has found the party in this suit whose carelessness inflicted it, and that is the government of the District of Columbia, which he has sued.

There is a state of circumstances, as the court regards the law
31 in reference to this issue, under which the District of Columbia may be liable. The history of legislation shows that previous to this accident Congress had conferred upon the District of Columbia the municipal control of this street for the purposes of improvement, purposes of preservation, and purposes of police, as established in the authority of the act of incorporation that created the old municipality of the city of Washington. That power, thus created by the law-maker in the municipality of the city of Washington, created cor'elative duties on the part of the city of Washington, and, as I shall hold in this case, duties inherited by the government of the District of Columbia. These duties were to preserve the streets in a condition of safety to the citizen in passing over them. That is the duty. But the law-maker did not stop there. At a subsequent period of time Congress cre-
32 ated the power in the Baltimore and Potomac Railroad Company, a corporation created by the State of Maryland, and protracted into this jurisdiction by an act of Congress, with all the power and authority given to it by the State of Maryland. Congress, by this subsequent act, created in them the right to traverse this street with a railroad, and it upon such grade as they established, whatever it was, under the consent of the authorities of the District. There is no inhibition in the power granted to the corporation of Maryland, and protracted into this jurisdiction by the act of Congress, no limitation that the court has been advised of that prevented the establishment of this grade, under the consent of the District.

Mr. ELLIOT. The act of Congress which adopted the act of Maryland was an act authorizing its extension to the city-line. By the subsequent act it was authorized to come into the city.

33 The COURT. Yes, but it brought their chartered powers into the city, as I understand it. Is not that so—under the limitation of the law-making power of Maryland, the power to build the road and establish its grades? Now, I hold that this subsequent act of Congress creating this railroad corporation within the District of Columbia, and conferring upon that corporation the power to traverse its streets and the street in controversy here, to the extent of the power granted to the railroad supercceded the authority of the government of the District of Columbia, created in that corporation rights incompatible with the authority previously conferred upon the District, and so far as the ground occupied by their road is concerned, and so far as the space necessary to the construction of their road is concerned, temporarily in the one instance, and permanently in the other, gave them exclusive right over

34 the ground they occupied. The nature of the corporation, the nature of its machinery, the nature of its employments, all entering into the definition of the powers of the corporation, are incompatible with and exist exclusive of the power of the District to control that ground for the purposes of a highway. It is said that the ground thus occupied with this excavation was thirty-four feet and some inches—thirty-one feet within walls, and thirty-four feet some inches, walls inclusive, as I recollect the testimony. Within those lines and limitations the law-making power had created a control to the exclusion of the control of the city, but left upon either side of this tract from twenty (20) to twenty-five (25) feet subject to the political power and police power, the conservative control of the District of Columbia, for the purposes of a*n* highway. The railroad company having a right to make this ex-

35 cavation and occupy it, became liable to whoever was injured by reason of it; or their negligence and carelessness in the mode of doing it, for the injury entailed by reason of such negligence or carelessness; and it is the law, gentlemen, in the opinion of this court—and I pronounce it distinctly, that these questions may be made in the higher court, if parties desire it—that they become exclusively liable for injuries resulting from their negligence and their carelessness in the process of the construction of the road. There is another obligation l*a*ying behind this, and it is to this issue that I address your attention.

If the District of Columbia is liable to respond to the plaintiff in this case, it is not by reason of the negligence of this road to protect their excavation; the gravamen of the action does not lie there. It is by reason of the neglect of the government of the District

36 to provide against the neglect of the railroad company, and it changes the legal accountability of the parties in one important feature. A party creating a nuisance, excavating a pit into which a man may fall, has notice in the excavation itself to protect him. The fact that he has made it and exposed life and person to injury by reason of the creation of it, is all the notice that the law requires to charge him with the responsibility of it. It is a notice that travels with the excavation, every spadeful*l* of dirt that is thrown out of it. But where a stranger creates a nuisance, and a third party is sought to be held responsible for it, as in the instance of the District of Columbia here, whereas in this case the railroad had a right to make this excavation, and its only fault is that it made it so carelessly, and neglected to protect against it, the accountability of the defendant is trans-

37 ferred to a responsibility to protect against the carelessness of

others, and that responsibility arises upon notice that others have neglected their duty. It is claimed here by the plaintiff that the District of Columbia, which had the control of the spaces between this excavation and the street-line, knew that the railroad company was not protecting this excavation against accident, and, knowing it, neglected thereof to provide such protection as was necessary; this is claimed by the plaintiff. The plaintiff contends that he has satisfactorily proven this, that during the progress of this excavation, and after its completion, the railroad company was habitually neglecting to put up proper barriers to guard against accident, and that the government of the District of Columbia, through its agents in charge of the streets, were advised of that negligence, and notwithstanding such knowledge and advice
38 permitted the negligence to remain until one of its citizens was overtaken with this accident; this is the claim of the plaintiff. The defendant, on the other hand, claims that they have proven that the railroad company began, first, with temporary barriers of such description as you have heard described in the testimony, and afterwards with stronger ones; that they did maintain these barriers; that when they were violated and taken away that they replaced them; and this is the issue of fact that the parties make before you, which it is your exclusive jurisdiction and duty to determine. All the court can say to you upon this subject is this: If you find in the testimony, either that the responsible agents of the District of Columbia, those in charge of its highways, had express notice of the negligence of the railroad company to protect the pit, or if you find that the negligence remained so long and prevailed so publicly that the party in
39 charge of the responsibility of conserving the safety of the road would be presumed to know, and in the absence of knowing would be culpable of a neglect of the ordinary instrumentalities to inspect and find out the condition of the road, you will regard that as a notice; but you are to find out from the proof and circumstances of the case. It is not to be presumed; it is to be found by the proof. The plaintiff undertakes when he charges negligence, as he does when he charges injury, to make proof of both, and if a resort is had to circumstances, and the implication which circumstances raises, these circumstances should be the equivalent of express proof. Now, if you shall find, first, that the railroad company neglected to maintain suitable guards around this excavation while it was in process of construction; and if you shall find, secondly, that the city had notice of it, in
40 the manner which I have explained, either express and direct notice, or the notice reasonably presumable from long neglect, and that the plaintiff met with his injury there without his fault, you will find a verdict for the plaintiff. On the other hand, if you find they had no notice of it, or that the railroad did not neglect *to* guarantees of safety about the excavation, you will find for the defendant.

If you find for the plaintiff, you will mete out compensatory damages for his injury, of which you are the judges under the proof.

Mr. ELLIOT. I did not hear a part of your honor's charge, being otherwise engaged. In respect to this doctrine of notice, I understand the court to say that the jury should find that there was express notice, or the equivalent of express notice.

41 The COURT. And then I defined what I understand to be the equivalent.

Mr. ELLIOT. I would ask your honor to say to the jury that they are at liberty, from the circumstances developed in the testimony, to infer the defendant had notice.

The COURT. Yes; I have told the jury and repeat, that in the absence of express notice, if they find long-continued neglect to protect the street on the part of the District——

Mr. ELLIOT. Either by barriers or lights——

The COURT. Put it in a suitable condition for travel——

Mr. COOK. On the part of the railroad——

The COURT. Yes; on the part of the railroad or on the part of the District either. If you find that negligence to have transpired for a period that would raise the presumption on the part of the conservators of the streets of negligence to do their duty in ascertaining the facts, you will regard that as the equivalent of notice.

42 Mr. ELLIOT. To that part of the charge relating to the exclusive liability of the road we except, of course.

Mr. Cook reserved a general exception, stating that he would designate the particular portions as soon as he had an opportunity to examine the same by having a copy furnished him.

To so much of said charge as relates to the liability of the District of Columbia for the injury complained of by the plaintiff, and to so much of said charge as relates to the liability of the defendant on the grounds of inferred or presumed notice, the defendant, through its counsel, excepted, and prayed the court to sign and seal this its third bill of exceptions; which is done this 26th day of April, A. D. 1873.

D. K. CARTTER, [SEAL.]
Chief-Justice.

Motion for new trial.—Filed in general term, Sept. 23, 1873.

43 In the supreme court of the District of Columbia.

WM. BARNES
v.
DIS. OF COL. } Gen. term.

And now comes the defendant and moves the court here for a new trial on exceptions filed.

W. A. COOK,
Atty. for D. C.
ENOCH TOTTEN,
Of Counsel.

Proceeding of court resumes.

MONDAY, *November* 10, 1873.

Session resumed pursuant to adjournment.

Present: Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

WILLIAM BARNES, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9329.

44 And now again come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it seems to the court here that there is error in the record and proceedings and in the judgment of the circuit court: Therefore it is considered by the court here that, for the errors aforesaid, the judgment of the circuit court

be reversed, that the verdict aforesaid be set aside, and the judgment thereon entered be vacated, and that the case be remanded to the circuit court, that a new trial may be had of the issues aforesaid.

SATURDAY, *December* 6, 1873.

Session resumed pursuant to adjournment.
Present: Chief-Justice Cartter, and Justices Wylie and MacArthur.

45 WILLIAM BARNES, PLAINTIFF,
v.
THE DISTRICT OF COLUMBIA, DEFENDANT. } At law. No. 9329.

Upon reading the entry of the judgment of this court in this cause, in the minutes of November 10, 1873, it is ordered that the said entry be, and is hereby, vacated, the court being of opinion that the defendant ought to have judgment notwithstanding the verdict in favor of the plaintiff: Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defence, to be taxed by the clerk, and have execution thereof.

46 Office of the clerk of the supreme court of the District of Columbia, *ss:*

FEBRUARY 7TH, 1874.

I certify that the foregoing is truly copied from originals on file and of record in this office, which originals together constitute the record and proceedings of the said supreme court of the District of Columbia in the case mentioned in the writ of error to which this certificate is annexed.

Witness my hand and the seal of said court the day and year aforesaid.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 147. William Barnes, plaintiff in error, vs. The District of Columbia. Dist. of Columbia sup. court. Filed 11th February, 1874.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1875.

WILLIAM BARNES, *Plaintiff in Error*,
v.
THE DISTRICT OF COLUMBIA.
No. 147.

W. D. DAVIDGE,
R. K. ELLIOT,
Counsel for plaintiff in error.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court, United States.

October Term, 1875.

WILLIAM BARNES, *Plaintiff in Error*,
v.
THE DISTRICT OF COLUMBIA.
No. 147.

THE CASE.

The plaintiff in error sued the defendant in error to recover damages for physical injury sustained by him by reason of the negligence of the defendant in respect of a certain public street in the city of Washington.

(Record, pp. 2, 3.)

The defendant pleaded the general issue. (Record, p. 4.)

The jury found a verdict for the plaintiff, assessing damages at $3,500, and costs, and thereupon judgment was duly entered on the verdict. (Record, p. 5.)

Defendant then moved for a new trial, assigning *five* grounds, all of which were addressed to *the discretion* of the court, and no one of which had any relation to exceptions taken at the trial. (Record, p. 5.)

This motion was argued and overruled. (Record, p. 6.)

Subsequently, execution issued on the judgment, and the writ *of fieri facias* was returned "levied as per schedule." (Record, p. 6.)

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By the act of Congress establishing the Supreme Court of the District of Columbia, approved March 3, 1863 (12th Statutes, 764), it is provided: "That if, upon the trial of a cause an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case, or bill of exceptions, with so much of the evidence as may be material to the questions to be raised." * * * * * * *

By the same section it is also provided that: "The justice who tries the cause may, *in his discretion*, entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages." And the *proviso* is, "that such motion be made at the same term, or circuit at which the trial was had. When such motion is made and heard upon the minutes, an appeal to the General Term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner." And by section 9 of the act it is provided, "that a motion for a new trial on a case or bill of exceptions * * * * * * * * * * * * * * shall be heard in the first instance at a general term."

It is thus apparent that there are two kinds of motion for a new trial contemplated by the act: one when the motion is based upon exceptions *taken at the trial*, which is to be heard in the first instance in the court in *banc*, and the other a motion made on the minutes of the justice trying the cause, and based upon exceptions, insufficient evidence, or excessive damages, which latter motion is to be entertained in the *discretion* of the justice and is to be decided by him, and from *such* decision *an appeal* to the court in *banc* is provided for, upon a case or

bill of exceptions to be settled in the usual manner. All other grounds for a new trial are as at common law, and rest in the sound *discretion of the judge*, who tries the cause, from *whose decision* there is *no appeal.*

In respect of the statutory grounds for a new trial, it is further apparent that the first based upon exceptions taken at the trial, is matter of *absolute right*, being, in short, the re-enactment of the right of exception conferred by the statute of Westminster, whilst all the others rest upon judicial discretion, as the judge may or may not entertain the motion, though, if he does, an appeal will lie from his decision to the Court in General Term.

In the present case, the motion for a new trial was rested as to the 1st, 3d and 5th grounds on the statute, and from the decision no appeal was taken; and as to the other grounds upon the common law, irrespective of the statute, and the decision of the judge was final, and as no motion for a new trial on the exceptions taken at the trial had been made and filed, there was then an end of the case. The judgment was final and execution properly issued.

Afterwards, at the second term of the Court in General Term, succeeding the trial, and after the term held by the justice who tried the cause had been adjourned, and another term of the Circuit Court had intervened, a motion for a new trial was made in the General Term based on the exceptions taken at the trial, although no bills of exception had been filed, or noted upon the minutes of the court. (Record p. 7.)

The court, however, ordered the bills to be filed *nunc pro tunc*, and allowed the motion for a new trial thereon to be filed in that court, and assumed jurisdiction of the case. (Record p. 7.)

The making of such a motion in the Court in General

Term was without precedent, and in violation of the rules of court and the uniform practice. The 9th section of the act (cited above) contemplates the making and filing of the motion in the circuit court, and provides for the hearing thereof, in the "first instance, at a General Term."

After thus assuming jurisdiction, the court first granted a new trial, but subsequently rendered judgment for the defendant in error. (Record pp. 13, 14.)

Assignment of Errors.

The plaintiff in error submits that the judgment should be reversed.

1. Because it was error in the court below to assume jurisdiction of the case, and render judgment for the defendant in error.

2. The ordinance set out in the first bill of exception was properly admitted in evidence.

3. The prayer contained in the second bill of exception was properly refused, and—

4. The charge of the judge who tried the cause at the circuit, to the jury was correct.

First Assignment of Error.

It was error in the Court below to re-open the case after the lapse of the term at which it was tried and the lapse of another succeeding term, and at the second term of the Court in *banc* succeeding the trial, when the record contained no motion for a new trial, which, according to the act organizing the Court, was necessary in order to remove the cause to the Appellate Court, and in conjunc-

tion with a supersedeas bond to suspend the right of the plaintiff in error to the execution of the judgment in his favor.

The jury having found the issue made by the pleadings in favor of the plaintiff in error, such finding of fact was conclusive, and he was entitled to the benefit of the judgment thereon, and could not lawfully have been divested of his rights in the premises excepting by reversal on appeal in the mode pointed out by the statute.

Hence it was error in the Court below to assume jurisdiction of the case, and to render judgment for the defendant in error, *non obstante veredicto.*

Second Assignment of Error.

There was no error in the ruling of the justice who tried the cause at the Circuit; hence it was error in the Court *in banc* to reverse the judgment.

As to the first bill of exception: acts of Congress, approved February 5, 1867, March 18, 1869, and March 25, 1870, relating to the Baltimore and Potomac Railroad Company, conferred upon that corporation power and authority to enter the city of Washington, and to traverse K street southeast; and the company having been thus authorized to enter the city and to traverse the street in question, applied to the then municipal government of the city of Washington, for permission to change the grades of certain streets upon which it was proposed to construct the railroad. The city government gave the desired permission, by adopting the ordinance set out in the first bill of exception, (Record, p. 8), and thereby authorized the railroad company to change the grade of a portion of K street southeast, by reason whereof the plaintiff in error was injured as alleged. (Record, p. 2–3.)

Prior, however, to the date of the injury to the plaintiff (October 14, 1871), the Congress of the United States had repealed the charter of the city of Washington, and had created another municipal government over the entire District of Columbia, by the name of "The District of Columbia"—the defendant in error.

(Act of Congress, approved February 21, 1871, sec. 1.)

By section 40 of said act, the ordinances of the city of Washington are continued in force, and by section 41, the defendant in error is declared "*the successor*" of said city government. Hence, the ordinance in question was as much the ordinance of the defendant in error, as though it had been ordained by it, and it was direct notice to defendant of the authority conferred upon the railroad company to change the grade of a portion of the street in question, and defendant was bound, at its peril, to see that no citizen was injured by reason of the act which that ordinance authorized to be performed.

Dillon on Mun. Cor. §§ 245, 288, 289, 290.

The ordinance was the very act, by virtue of which the municipal corporation of the city, gave its assent to the proposed change of grade of K street. The acts of Congress authorizing the extension of the railroad into the city did nothing more than confer authority to enter. The power, necessary to the enjoyment of that right of entry was vested in the municipal corporation, and upon application on the part of the Railroad Company, it was conferred upon the latter corporation. Hence it follows, that being an act of the predecessor of defendant, continued in force by the law creating the defendant, it was binding upon it and was primary evidence, and entirely admissible in the case. In dependent of this, however, its admissibility will not be considered, or questioned in this court so as to disturb the finding of

the jury, unless it appear by the record, that it was error to the prejudice of the defendant, for, although it might have been improperly admitted in evidence, yet if from the whole case it appear that it could not have worked injury to the defendant, the verdict will not be disturbed, and the finding of the jury will be conclusive.

Greenleaf vs. Birth, 5 Pet., 132.

Upon this point, the Court will observe that there was no statement of the evidence in the cause before the court below.

Third Assignment of Error.

The ruling at the circuit upon the prayer set out in the Second Bill of Exception (Record, p. 9), was correct, hence it was error in the court below to reverse the judgment.

The prayer excluded the possibility of any liability on the part of the defendant in error, notwithstanding the pleadings and evidence, and if in any aspect of the case the defendant might have been liable, the prayer should not have been granted, because if it was not correct in its very terms it was not error to refuse it.

Brooks vs. Marbury, 11 Wh., 78.

U. S. vs. Bank of Metropolis, 15 Pet., 377.

Catts vs. Phalen, 2 H. 376.

And here it becomes important to examine the declaration (Record pp. 2, 3). It is therein alleged, that the highway or street in question was "out of repair, and in a dangerous and unsafe condition by reason of the gross negligence and default of defendant." The prayer (Record p. 9) requested the court to inform the jury in substance, as matter of law, that if such were the

fact, the plaintiff could not recover, for the reason that the act incorporating the defendant in error confers "entire control of the streets and avenues upon the Board of public works," &c., &c.

In order to test the accuracy of this proposition as applied to the present case, it is not necessary to draw a very fine distinction between the power and authority of the Board of Public Works, created by the 37th Section of the act of incorporation, and the general, and almost unlimited grant of power, authority, and means conferred by the whole act upon the defendant in error as a municipal corporation. Suffice it to say, that the latter was the governing body, invested with power and authority to make laws, or pass ordinances, and to levy and collect taxes, whilst the former was a board of officers appointed to perform ministerial duties pertaining to the muncipal corporation, and whether they had more or less power and authority over the streets of the city, is matter of no consequence in the present case, unless it fully appear that the defendant in error had none.

An examination of the act of February 21st, 1871, creating the defendant corporation, will show—

1. That it was a municipal corporation.

2. The successor of the corporations of Washington and Georgetown; that its legislative authority extended to all rightful subjects of legislation within the district.

3. That it had authority to appoint all necessary officers and agents.

4. That it had power of taxation.

5. That it had authority to direct the Board of Public Works.

6. That the Board had no power of taxation, nor au-

thority to appoint officers or agents without the sanction of defendant; nor had they a fund, or power to raise a fund, independent of the will of defendant.

It is true that the board was appointed by the Federal Government; so was the defendant in error created by the same power, and so were many of the principal officers of the corporation defendant.

The 37th section of the act in question, vesting in the Board of Public Works, "entire control of the streets," &c., &c., may be construed as excluding the control of any other officers of the corporation, but not as relieving the defendant in error from the responsibility pertainingto it as a municipal corporation in respect of the safety of the citizen in the public streets, within the corporate limits, and since there is nothing in the act of incorporation granting such absolution, "the true rule of construction is that the legislature intended that the corporation's liability should, to the extent of its corporate funds, be co-extensive with that imposed by the general law upon individuals doing (or neglecting to do) the same things."

Sherman & Redfield on Negligence, § 124.

This Court has repeatedly affirmed the general doctrine of the liability of municipal corporations for negligence in respect of streets, avenues, &c., &c., resulting in injury to citizens.

Washington v. Weightman, 1st Bl., 39.

Nebraska City v. Campbell, 2d Bl., 490.

Chicago v. Robbins, ~~How.~~ 2 Black 418.

S. C., 4 Wall., 657.

The same doctrine has been uniformly held in the States.

Dillon on Mun. Corp., § § 761, 764, 785.

Sherman & Redfield on Negligence, § § 119, 120, 124, 130, 132, 136, 147.

Lloyd v. The Mayor, 5 N. Y., 369.

Storrs v. Utica, 17 N. Y., 105.

Hutson v. The Mayor, 9 N. Y., 163.

Grant v. Brooklyn, 41st Barbour,——

Baltimore v. Marriott, 9 Md., 174.

Wheeler v. Troy, 20 N. H.,——

Currier v. Lowell, 16 Pick., 170.

It is of no importance, in respect to the primary legal responsibility of the municipal corporation, to the citizen injured, whether the pitfall or excavation in the street were made by a third party under the authority of law, or by the direct act of the municipal government, the citizen may sustain his action against the corporation, and the defendant, when adjudged to pay damages, has its remedy over against the author of the mischief.

Chicago v. Robbins, 4 Wall., 657.

Lowell v. The R. R., 23 Pick., 24.

Hampden v. The N. H. & N. R. R., 27 Conn., 158.

Dillon on Mun. Corp., § § 791, '94, '95, '96.

Sherman & Redfield on Negligence, § § 400, 451, 452.

The municipal corporation having the power and authority, in general terms, by the act of incorporation, and exercising the high prerogative of taxation, by virtue of which it is vested with ample means, may open new streets, repair old ones, make provision for the erection of lights, may provide barricades, or other instrumentalities of safety for dangerous places, and these are all corporate duties, and in the language of the act of Con-

gress incorporating the defendant, "rightful subjects of legislation."

Van Ness v. City of Washington, 4 Pet., 281.

The prosecution of a work authorized by the corporation (as in the present case—the change of grade) is ministerial in its character, and the corporation must see that it is done in a safe and skillful manner. This is a corporate and a ministerial duty not discretionary, but mandatory, absolute and perfect.

Washington v. Weightman.

Chicago v. Robbins, cited above.

Fourth Assignment of Error.

The third bill of exception (Record, pp. 9,–13) contains the charge of the judge, who tried the cause at the Circuit, to the jury, and exception was taken to so much and such parts thereof, as refer to the general liability of the defendant for the injury to the plaintiff in error, and also to the particular liability, on the "grounds of inferred or presumed notice."

It is respectfully submitted that there was no error in the law of the case—as announced in the charge—hence it was error in the court below to reverse the judgment by reason of anything therein.

Rule is, that in examining the charge to the jury for the purpose of ascertaining its correctness, the whole scope and bearing of it must be taken together.

Magniac v. Thompson, 7 Pet. 348.

The meaning of the first branch of the exception is not very clear, but assuming it to present the same question as that embraced withing the second bill of exception, it is submitted, that if plaintiff in error had met

with the injury complained of by the direct, positive act of the Board of Public Works, in performing duties pertaining to the municipal corporation as *such*, rather than by the negligence of the corporation in failing to protect the citizen against accident, by reason of pitfalls or excavations in the public streets, the defendant in error would have been liable, and a *fortiori* in the present case.

Assuming, for the sake of argument, that the accident occurred by reason of the negligence of the board (which does not appear in the record) it would have been impossible to suggest a defence to the action, excepting upon its merits, if the board had been *appointed* by the defendant in error. How can the fact that they were appointed *for* the defendant make any difference in respect of the liability of the latter, as they were clearly a part of the machinery of the corporation.

Dillon on Mun. Cor., §§ 765, 766, 779, note 6.

The Mayor v. Bailey, 3d Hill, 358, S. C. 2 Denio, 444.

Thayer v. Borton, 19 Pick. 411.

Sherman & Redfield on Negligence, §§ 155, 173.

As to the second branch of the exception, viz: that relating to the law arising "upon inferred or presumed notice," the charge to the jury was correct.

This court has laid down the same doctrine, and it may be regarded as settled law in this country and in England.

Mayor v. Sheffield, 4 Wall, 189.

Mersey Docks v. Gibbs, 11 H. L. Cas. 687, 701.

Dillon on Mun. Cor. §§ 790, 795.

And authorities cited.

Sherman & Redfield on Negligence, §§ 147, 407.

Conclusion is, that the judgment of the court below is erroneous, and that plaintiff in error is entitled to judgment on the verdict.

W. D. DAVIDGE,
R. K. ELLIOT,
Counsel for plaintiff in error.

RULES OF PRACTICE IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, 1873.

TERMS OF THE COURT.

2. The GENERAL TERMS are held—

1st MONDAY OF JANUARY.
3d MONDAY OF APRIL.
4th MONDAY OF SEPTEMBER.

The CIRCUIT COURT is held—

4th MONDAY OF JANUARY.
2d MONDAY OF MAY.
3d MONDAY OF OCTOBER.

The DISTRICT COURT is held—

1st MONDAY OF JUNE.
1st MONDAY OF DECEMBER.

The CRIMINAL COURT is held—

1st MONDAY OF MARCH.
3d MONDAY OF JUNE.
1st MONDAY OF DECEMBER.

The SPECIAL TERMS are held 1st TUESDAY of every month, save AUGUST, in which month there is no Court.

SETTING ASIDE VERDICT AND GRANTING NEW TRIAL.

60. A verdict may be set aside and a new trial granted—

1. For errors of law by the justice presiding, in his rulings during the trial, or in his instructions to the jury.

2. Because the evidence is insufficient to support the verdict.

3. Because the damages assessed by the jury are excessive.

4. Because the party moving for the new trial had no notice, and did not appear at the trial.

5. For misbehavior of the successful party.

6. For misbehavior of the jury.

7. Because the verdict is unreasonable or uncertain.

8. Because the verdict was obtained by surprise.

9. Because a new and material fact, unknown, at the time of the trial, to the party moving, has come to light since the trial, and the like.

MOTION FOR NEW TRIAL.

61. Every motion for a new trial shall be in writing, and shall state in separate paragraphs, successively numbered, the grounds upon which it is based; and it shall be entered upon the minutes of the court on the day it is presented to the court.

62. No motion for a new trial (other than such as must be heard in the general term in the first instance) shall suspend the entering of the judgment.

TO BE MADE PART OF RECORD.

68. In every case, the fact of the settling and filing of the bill of exceptions, and that it is made part of the record, shall be noted in the minutes of the court.

Supreme Court of the United States.

OCTOBER TERM, 1875.

WILLIAM BARNES,
Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA.
No. 147.

BRIEF FOR DEFENDANT IN ERROR.

EDWIN L. STANTON,
Counsel for District of Columbia.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1875.

WILLIAM BARNES,
Plaintiff in Error,
vs.
THE DISTRICT OF COLUMBIA. } No. 147.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On January 16th, 1872, plaintiff brought an action against the District of Columbia, alleging that on October 14th, 1871, and for a long time prior thereto, there was a public highway in the city of Washington called K street southeast, and that defendant was bound to keep said highway in such a condition as to render it safe and convenient for passengers; that on October 14th, 1871, said highway was out of repair and in a dangerous and unsafe condition, by reason of the negligence and failure of the defendant, of which it had notice; that defendant, not performing or regarding its duties as aforesaid, permitted said highway to be, and remain, out of repair, and without light or barricade at or near a certain excavation in said street, between Sixth and

Seventh streets east, and made no effort to secure the same against accident, or to warn persons passing along said street of the existence of said excavation; by means of, and in consequence of, which gross negligence and failure of the defendant to perform its duty in that respect aforesaid, the plaintiff, while walking moderately and carefully along said street, along the north side thereof, fell into said excavation and met with certain injuries, for which he claims $30,000 damages. Defendant pleaded the general issue. In the Circuit Court on March 21st, 1873, a verdict was rendered in favor of the plaintiff for $3,500. (Record 5.) On September 23d, 1873, upon motion made by the defendant, the Court, in in General Term, passed an order reciting that it appeared to the Court that a bill of exceptions was tendered to the Circuit Court during the term for which judgment aforesaid was rendered, to wit: on April 20th, 1873, and that the same was signed and sealed by the Justice presiding at the trial, but through clerical omission was not made of record in the minutes of the Court; and it was thereupon directed that said bill of exceptions be made part of the record, and that defendant's motion for a new trial on exceptions stand for argument, the same as though said bill of exceptions had been made of record in said Circuit Court. (Record, 7.) The bills of exceptions, duly signed and sealed, are set forth in the record. (Record, 8, 9, 10, 11, 12, 13.) These, exceptions were taken:

First. To the admission in evidence of a certain ordinance of the late Corporation of Washington approved May 30, 1870. (Record 8.)

Second. To the charge of the judge respecting inferential or presumptive notice to the defendant of the condition of the streets.

Third. To the liability of the municipality called the District of Columbia, under the act of Congress of February 21, 1871, for an accident resulting from the condition of a street in the city of Washington.

At the hearing in the General Term judgment was first

entered setting aside the verdict below and directing a new trial; but afterwards the entry was amended and judgment entered in favor of the defendant, notwithstanding the verdict in favor of the plaintiff.

It is stated in the brief for the plaintiff in error, (page 3,) that the order of the Court in General Term directing the bill of exceptions to be entered upon the minutes was made at a second term of the court succeeding the trial, and after the term of the Circuit Court at which the trial was had had been adjourned and another term of the Circuit Court had intervened. This does not appear by anything upon the record, nor is it material in view of the order of the Court in General Term declaring that the bills of exceptions had been omitted from the minutes by clerical accident, and directing that they be entered of record *nunc pro tunc.* (Record, 7.)

POINTS.

I.

The first assignment of error in the brief for plaintiff in error is that the Court in General Term could not take jurisdiction in the case.

The facts relied upon by plaintiff in error to support this purely technical proposition do not appear of record. The facts shown by the record entitled the Court in General Term to take jurisdiction of the case. By section 9 of the Act of Congress of March 3, 1863, 12 Stat. at L., 764, a motion for a new trial on a bill of exceptions is to be heard, in the first instance, at the General Term. It was shown to the court that by clerical omission the bill of exceptions duly taken had not been entered upon the minutes, and the court directed that the entry should be made *nunc pro tunc.* This being done, there was no usurpation of authority.

II.

The second assignment of error is "that the ordinance

set out in the first bill of exceptions was properly admitted in evidence." It is submitted that the ruling of the Judge of the Circuit Court, to which the first bill of exceptions relates, is not to be reviewed here. The judgment which is the subject of the writ of error to this Court is that rendered by the Court in General Term, and set forth on Record, page 14. The judgment is for the defendant, notwithstanding the verdict for the plaintiff. If there be error in that judgment the cause should be remanded to the Court in General Term. A judgment of the Court in General Term granting a new trial for error in admission of evidence, is not the subject of review here.

But if the ruling at the Circuit Court, admitting the ordinance in evidence, is in this case a proper subject for examination by this Court, then it is submitted that the ruling was wrong and the views expressed by the Court in General Term, (1 McArthur 328,) are right. The ordinance was one by the late corporation of Washington, reciting that Congress had authorized the Baltimore and Potomac Railroad Company to construct a railroad into the city, and given it the option of two lines into the city, one by K street and the other by North Carolina avenue, and that the railroad company had selected the K street route, and made application to construct their road upon it; and thereupon the municipal ordinance enacted that the railroad company be permitted to construct their road along certain streets, including part of South K street, and to change the grades of certain streets according to certain plans, upon condition that the streets used by the road should be bridged or otherwise covered by the railroad company, at its expense. (Record 8.) At the time of the trial, and at the time when the action was brought the charter of the late corporation of Washington had been repealed, by the act of February 21st, 1871, [16 Stat. at Large, 419,] and a new municipality with more extensive boundaries had been created. The new municipality had no control over the streets of the city of Washington; such control being committed to a Board of Public Works,

consisting of United States officers. The ordinance of the city of Washington was irrelevant to the issues in this case.

It doubtless was offered to connect the District of Columbia with the construction of the Baltimore and Potomac Railroad along the street on which the accident occurred. But the District was not responsible for the permission to the Company to occupy the street. It is urged in the brief for the plaintiff in error that the District of Co- lumbia might have repealed the ordinance of the Corporation of Washington, and withdrawn the permission to the railroad company to change the grade of the street in question. But by Acts of Congress of February 5, 1867, March 18, 1869, and March 25, 1870, (14 Stat. at Large, 388; 16 Id. 1–78,) the railroad company had the right, under United States laws and independently of the municipal ordinance, to pass along said street, and was obliged to conform to the grade of the street unless Con- gress should authorize a different level. The municipality of the District could not repeal this Act of Congress. Andby the Act of February 21, 1871, the Board of Public Works had entire control of the streets. The District passed no law and did no act in the matter. It had no such power. The argument in behalf of plaintiff in error upon this point shows how prejudicially the ordinance in question was used against the interests of the District by way of charging it with having caused a change of the grade of K street, and the excavation where the accident occured.

III.

The only remaining question which need here be discussed, is whether as a proposition of law it is true that, as alleged in plaintiff's declaration, the defendant municipality, was, at the time of the accident, bound to keep K street in repair, and is liable for an accident resulting from the street being in a defective condition. To this question the third assignment of error relates. Undoubtedly the Court in General Term

directed judgment for the defendant, notwithstanding the verdict in favor of plaintiff, because, in the opinion of that court, the District of Columbia is not charged with such a duty, nor burdened with such a liability. The decision of the court is reported in 1 MacArthur, 322. If the duty and liability were not imposed upon the municipality, then there was no error in the rendition of judgment for the defendant. The declaration imputes to the defendant no other negligence than that of neglect to perform an alleged legal and municipal duty, namely, neglect to keep said highway in such condition as to render it safe and convenient for passage and transit. The accident is claimed to have resulted from "gross negligence and failure of defendant to perform its duty in that respect aforesaid."

Whether the action in the case is maintainable against the District of Columbia, depends, in the language of this court, in Weightman *v.* The Corporation of Washington, 1 Black, 50, upon the terms and condition of its charter. It must appear that keeping the highways in repair is a specified and clearly defined duty enjoined upon the municipality, in consideration of the privileges and immunities which the act of incorporation confers and secures, and that the means to perform the duty are placed at the disposal of the corporation, or are within its control.

1. Under article 1, section 8, clause 17, of the Constitution, Congress has power:

"To exercise exclusive legislation, in all cases whatsoever, over such District, (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

An act, approved July 6th, 1790, (1 Statute at Large, 130,) accepted a district of territory upon the Potomac, not ex-

ceeding ten miles square for the permanent seat of government for the United States, said district to be surveyed and defined by three commissioners, under the direction of the President. The same enactment authorized the commissioners to purchase or accept such quantity of land as the President should deem proper for the use of the United States. Under this authority, the commissioners selected the whole of the territory embraced within the present limits of the city of Washington as that portion of the District, within the exclusive control of Congress, which they deemed necessary for the use of the United States.

The deed of conveyance from the original proprietors of the soil to the commissioners was made upon the trust that all the lots thereby sold, or such part thereof as might be thought necessary or proper, be laid out, together with other lands within the said limits, for a federal city, with such streets, squares, parcels, and lots as the President of the United States for the time being should approve; and after the President had indicated all the streets, squares, parcels, and lots that he should deem proper for the use of the United States, there was to be a fair and equal division of the remaining lots between the United States and the original proprietors, and the reconveyances from the Government were to be subject to such terms and conditions as might be thought reasonable by the President for the time being for regulating the materials and manner of the buildings and improvements on the lots generally, in the said city, or in particular streets or parts thereof, for common convenience, safety, and order. The land was not simply dedicated by the original proprietors for use for public squares, streets, or avenues, but the absolute fee-simple vested in the United States, so that the Government can at any time close a street or occupy a public square. (Van Ness *v.* Washington, 4 Peters, 232.) By the act of July 16th, 1790, it was provided that the operation of the laws of the State within the district selected for the permanent seat of government should not be affected by its

acceptance for that purpose until the time fixed for the removal of the Government, or until Congress should otherwise by law provide. The commissioners appointed pursuant to that act seem to have admininistered the affairs of the new city of Washington; for, by the act to abolish the Board of Commissioners in the city of Washington and for other purposes, approved May 1st, 1802, (2d Stat. at Large, 175,) it is provided that the affairs of the city of Washington, which had theretofore been under the care and superintendence of said commissioners, shall thereafter be under the direction of a superintendent, appointed by and under the control of the President, and invested with the powers and charged with the duties of the said commissioners under acts of Congress and acts of the General Assembly of Maryland, or under the deeds and deeds of trust from the original proprietors of the lots.

Thus far no liability was imposed on the inhabitants of Washington in respect to the condition of property used by the United States. Such liability, however, was afterwards placed upon them by enactments of a provisional character. It will be seen that the liability was designed to be of only temporary continuance, and terminated when Congress put the control of the streets, owned in fee-simple by the United States, into the hands of a federal commission.

2. On May 3d, 1802, there was approved an act to incorporate the inhabitants of Washington. (2d Stat. at Large, 195.) This enactment constituted the inhabitants of the city a body corporate, by the name of the Mayor and Council of the city of Washington.

From time to time other enactments of a similar character were passed. (Sec. 2 Stat. at Lar., 284; Id. 721; 3 Stat. at Lar., 543; Id. 582; 9 Stat. at Lar., 223; 13 Stat. at Lar., 68; Id., 434.)

These various acts for the government of the District, by which Congress exercised its power of exclusive legislation over the territory selected for the seat of Government, were of a temporary character Many of them specifically pro-

vide the time for which they were to continue in force; many of them were designed for a brief period; and all of them contemplated future change.

Prior to February 21st, 1871, the corporation of the city of Washington had, under congressional enactments, full power and authority to open and keep in repair, streets, avenues, alleys, drains, and sewers, agreeably to the plan of the city; to lay taxes upon particular wards, parts, or sections of the city for their particular local improvements; to cause the foot and carriage-ways to be set and paved; to introduce necessary sewerage and drainage facilities; to cause avenues, streets, alleys, to be suitably paved or repaired; to lay and collect the taxes upon the property bordering upon each street or alley that might be so paved or sewered; to lay or cause to be laid water or gas service-pipes or lateral house-drains simultaneously with the grading or paving of any avenue, street, or alley in which a main water pipe or main gas pipe, or main sewer pipe might have been laid.

3. On February 21st, 1871, was approved "An act to provide a government for the District of Columbia," (16 Stat. at L. 419.) Section 1 constitutes that part of the territory of the United States included within the limits of the District of Columbia a body corporate for municipal purposes, by the name of the District of Columbia, with the usual powers of a municipality not inconsistent with the Constitution and laws of the United States, and the provisions of said act. Section 40 repeals the charters of the cities of Washington and Georgetown, on June 1st, 1871, and at that date abolished all the offices of said corporations, with the limitation, however, that the charters should continue in existence for the collection of sums due to them and the enforcement of contracts made by them, and of just claims against them. Section 41 declares the new municipality to be the successor of the old ones, and to be invested with the property thereof. Section 2 vests executive power and authority in a Governor, and authorizes him to grant pardon

for certain offences and to commission officers. Section 3 gives him the veto power under certain restrictions. Section 4 provides for a secretary to record the proceedings of the legistature and the governor in his executive department. Sections 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 33, relate to the composition of the Legislative Assembly and extent of its authority and the mode of transacting its business; and particularly by section 18 the power of the Legislative Assembly is restricted not only by the Constitution, but by the provisions of the act itself. Section 25 enacts that the courts of the District shall remain as organized at the time of the passage of the act, until abolished or changed by act of Congress, but the Legislative Assembly is given power to confer additional jurisdiction upon them. Section 26 provides for a Board of Health, to be appointed by the President and confirmed by the Senate, and prescribes its duties. Section 27 provides that the office and duty of Register of Wills, established by act of Congress of February 27th, 1801; Register of Deeds, established by act of February 14th, 1863; United States Attorney, provided for by act of February 27th, 1801, and United States Marshal, (see same act,) shall remain as under existing laws until modified by act of Congress; but power is given to the Legislative Assembly to impose additional duties upon said officers respectively. Sections 31, 32 and 38 relate to oaths of office, and to salaries and their mode of payment. Section 34 provides for a Delegate to the House of Representatives. Section 35 provides that the Secretary of the Treasury may prescribe the security to be given in respect to the disbursement of money by such of the said officers appointed by the President and confirmed by the Senate, pursuant to the act, who by virtue of any provision of law are required to give security. Section 36 provides for a valuation of real estate in the District. Section 39 relates to elections. Section 37 creates a Board of Public Works, to consist of the Governor and four persons to be appointed by the President

and confirmed by the Senate. It provides for the mode in which they shall disburse moneys appropriated by the United States or District of Columbia, or collected from property holders, and in which they shall make contracts. It enacts that the Board of Public Works shall have entire control of, and make all regulations which they shall deem necessary, for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the Legislative Assembly, or Congress.

(1.) Thus the act relates not merely to the municipality created under the name of the District of Columbia, but also to the duties of other officers, judicial as well as executive, not branches of the municipality, but exercising independent authority under the laws of the United States, including the Supreme Court of the District, which, in addition to other jurisdiction, possesses that of a District and Circuit Court of the United States, and including, also, the United States attorney and United States marshal. The municipality was entrusted with no control whatever over the streets and avenues of the city. Entire control was given to a Board of Public Works, a federal commission which was also authorized to make all regulations which it might deem necessary for keeping them in repair. The Governor, possessing the executive authority of the municipality, was only *ex-officio* a member of this board, and his associates, as well as himself, are appointed by the President and confirmed by the Senate. The secretary of the municipality had no power to record the proceedings of the board, but only of the Legislative Assembly and of the Governor "in his executive department." The power of the board was independent of the Legislative Assembly. It was contemplated by the act that it should disburse appropriations made by the Congress of the United States, as well as those which the Legislative Assembly might see fit to make. Congress did appropriate several millions of dollars to be disbursed by the board, or to pay its expenditures.

The duty of making such appropriations was not enjoined upon the Legislature. If additional work might be entrusted to the Board of Public Works by the Legislative Assembly, so also might additional duties be given by it to the United States attorney, United States marshal and the Supreme Court of the District. Apart from such additional duties as might be so imposed by the Assembly, the board had its powers as distinctly prescribed by act of Congress as did the other offices just named, and it was as independent of the Assembly in respect of the authority committed to it by Congress Since Congress has supreme legislative power over the District of Columbia the citizens of the District have no right to participate in the exercise of that power, exeept, so far as may be delegated to them by Congress.

(2.) The United States possesses, untrammeled by any fetters, a fee simple title to the streets and avenues of the city, and it was not unreasonable that the control of them should be placed in the hands of United States officers independent of a municipality having ordinary governmental functions for the protection of the persons and property of its inhabitants.

A very full report was made to the Senate, February 2, 1835, in which the relations of the District are very clearly defined. After referring to the unusual magnitude and extent of the city, the great width of the avenues and streets, the creation of a city in a short space of time, the pressure for public improvements being sudden, the sparse population upon whom the burden fell, the report says:

"If the streets are its [the General Government's] property, and to be regarded as altogether under its control, it is not easy to perceive why it should call upon or permit others to keep that property in order; and if the streets are to be regarded as for the joint convenience of the Government and the inhabitants, the expenses of maintaining them should be joint, and in proportion to their respective interests; and the early action of the Government was in conformity to this principle."

A report of the House Judiciary Committee of the 43d Congress on the legal relations of the District, contains the following:

"The plan of the capital city, determined upon under authority of Congress, and subsequently on December 13, 1791, submitted to Congress by President Washington in a message of that date, further illustrates the purpose of the Federal Government in establishing its capital.

"This brings us to the consideration of the question as to the extent and character of expenses contemplated in building the Federal city. It is perfectly manifest from a moment's examination of this plan that a city was laid off here for the use of the United States upon a scale hitherto unknown in this or any other country; upon a plan to carry out which would inevitably lead to an expenditure entirely beyond the requirements of a city for business purposes. It was a plan having reference peculiarly to the wants of the Government and not to those of its inhabitants; its streets and avenues, in number, length and width, are upon a scale that was appropriate for a national capital, but was entirely inappropriate to the demands of a sparse population not engaged in manufacturing or commerce, and when manufactures and commerce were not encouraged to come. Not only are the streets unusually wide and numerous, but throughout the city are large reservations, so that it may be estimated that the whole area thus set apart embraces much more than one-half of the whole city, the streets and avenues alone, of which there are 260 miles, varying in width from 90 to 160 feet, amounting to one-half of the entire area of the city.

"The following table of comparative street areas will illustrate the scale of magnificence upon which the city was laid out:

Ratio of street areas of certain cities.

	Per cent.
Paris,	25.08
Vienna,	35.08
Philadelphia,	29.08
Berlin,	26.04
Boston,	26.02
New York,	35.03
Washington,	54.05

Similar legislation to the enactment giving control to federal officers to the exclusion of the municipality in certain localities may be found in other acts of Congress.

By section 7 of the act of Congress of June 12th 1858, (11 Stat. at Large, 326,) it was made the duty of the Comi missioner of Public Buildings to cause obstructions of every kind to be removed from streets, avenues and sidewalks in the city, improved in whole or in part by the United States, and to institute legal proceedings for that purpose when necessary. Although by section 37 of the act of February 21, 1871, the Board of Public Works had authority to assess upon property adjoining and benefited by improvements authorized by law, and made by that board, a reasonable proportion of the cost of the improvement, yet, by an act of March 3, 1873, (17 Stat. at Large, 519; section 152, Revised Statutes relating to the District,) Congress enacted that the Secretary of the Interior shall assess and collect the cost of all the improvements made in front of all private property adjoining streets about the Capitol. By law the Architect of the Capitol has had charge of the improvements upon such streets. These enactments show that, in other laws than that of February 21, 1871, Congress has given control of streets to United States officers and withheld it from the municipal authorities of the District.

And the considerations above presented show the reasonableness of not charging the inhabitants of the National Capital with the whole liability for accidents resulting from defective condition of the streets and avenues laid out on a magnificent scale not for local but for national purposes.

(3.) That to the Board of Public Works this entire control of the streets and avenues, with power to make all regulations which it should deem necessary for keeping the same in repair, was committed, not as to a department or subordinate agency of the municipality called the District of Columbia, but as to a federal commission, is shown also by other Congressional legislation. Its members were to

be appointed by the President and confirmed by the Senate. Section 76 of the Revised Statutes relating to the District enacts that no person shall draw a salary as a member of said board "*who shall hold any other federal office*, or who is paid a salary for the discharge of the duties of *any other federal office under the Government of the United States.*"

This enactment is derived from the acts of May 8th, 1872, (section 1, 17 Stat. at L., 74,) and of March 3d, 1873, (section 1, 17 Stat. at L., 499, 500.) An act of Congress, approved June 20th, 1874, (18 Stat. at L., part 3, page 116,) abolishes Governor, Secretary, Legislative Assembly, and Board of Public Works and Delegate in Congress in the District of Columbia. It distinguishes, in sections 2 and 6, between the accounting officers, other officials, laborers, employees, and the indebtedness of the District, and the accounting officers, other officials, laborers, employees, and indebtedness of the Board of Public Works. Another act, approved June 23d, 1874, (18 Stat. at L., part 3, page 220,) makes the same distinction between the District of Columbia and the Board of Public Works. See also act of Congress June 10/72 17 St L 350-357

(4.) The conclusion is thus reached, that, by the act of February 21st, 1871, a federal commission was given entire control of the streets and avenues, (the property of the United States,) with exclusive power to make regulations which that commission might deem necessary for keeping the same in repair. The Legislature might, if it saw fit, make appropriations for the improvements or repair of the streets. Such duty was not enjoined upon it. Liability on the part of the municipal corporation for neglect or omission of an absolute corporate duty springs from the particular nature of the duty enjoined, which must relate to the local or special interests of the municipality, and be imperative, and not discretionary or judicial, and from the means given for its performance, which must be ample. (Weightman *v.* The Corporation of Washington, 1 Black, 40; Dillon on Municipal Corporations, sec. 765.) In the case at bar the duty was not enjoined, nor were the means act of April 20-1871 17 St L 7. act of Jany 8 1873 - 17 St L 405-406

given. In the absence of an express statute, imposing the duty of keeping the streets in a safe condition, and declaring the liability for injury resulting from the neglect to perform this duty, the burden (if it exists) must appear, upon a fair view of the charter or statutes, to rest upon the municipal corporation as such, and not upon it as an agency of the State, nor upon its officers as independent public officers. (Dillon on Municipal Corporations, sec. 772, 789. Child *v.* Boston, 4 Allen, 41; Walcott *v.* Swamscott, 1 Allen, 101; Martin *v.* Mayor of Brooklyn, 1 Hill, 550.)

Under the authorities just cited, even if the Board be considered as part of the District Government, still it does not follow that the District is liable in the case at bar. If the power and the consequent burden be imposed not on the municipality as such, but upon its officers as independent public officers, the municipality is not liable. In this point of view it is immaterial whether or not the Board be considered as municipal officers or as an extrinsic federal commission charged with the care of federal property.

(5.) The case of Mayor of New York *v.* Bailey, 2 Denio, 444; S. C., 3 Hill, 531, is much relied upon by counsel for plaintiff in error.

In that case, the city of New York being the owner of a dam constructed upon land the title to which was in the city, and of works built to supply the city with water, was, upon great consideration, and with considerable difficulty, held liable (though the dam was constructed at the instance and expense of the State, by water commissioners appointed by the State, and not by the city authorities,) in an action for injuries sustained by third parties, in consequence of the dam, which was unskillfully built, being carried away by a freshet. The Supreme Court reached this decision by holding that the city, voluntarily accepting the benefits of the act, and instructing the commissioners to proceed with the execution of the work, constituted them its agents; and therefore the principle of *respondent superior* was applied. In the court of errors, Chancellor Walworth, with some

hesitation, assented to the confirmation of the judgment of the court below, but upon a different theory. He held that, the dam being the property of the city, the corporation was legally bound to see that its corporate property was not so used by any one as to injure occupiers on the river below. But none of these conditions of liability exist in the case at bar. The street was not owned by the municipality; nor was the excavation made at the instance or by procurement of the municipality. Neither the principle upon which the Supreme Court, nor the principle upon which the court of errors decided against the municipality, in the case of the mayor of New York *v.* Bailey, renders the District of Columbia liable in the case at bar.

(6.) Here are also wanting the conditions which were prescribed by the House of Lords, in Mayor of Lyme Regis *v.* Henley, (2 Cl. and Fin., 331,) and by this court in Weightman *v.* The Corporation of Washington, (1 Black, 40,) as being necessary to render a municipal corporation liable for neglect to keep a highway in repair. The duty was not enjoined upon the District of Columbia by the act of February 21st, 1871, nor were the means of performance placed at its disposal. Congress withheld from the municipality the control of the streets. The United States, owning an untrammeled fee simple in them, placed their control in the hands of officers whom the municipality could not, so far as this special charge is concerned, command. It results that an action like the present one cannot be maintained, and the judgment below, in favor of defendant, should be affirmed.

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